

THE “STOP ONLINE PIRACY ACT” (SOPA) VIOLATES THE FIRST AMENDMENT

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SUMMARY

H.R. 3261, the Stop Online Piracy Act or “SOPA,” violates the First Amendment, for several reasons:

- The notice-and-termination procedure of Section 103(a) runs afoul of the “prior restraint” doctrine, because it delegates to a private party the power to suppress speech without prior notice and a judicial hearing. This provision of the bill would give complaining parties the power to stop online advertisers and credit card processors from doing business with a website, merely by filing a unilateral notice accusing the site of being “dedicated to theft of U.S. property” – even if no court has actually found any infringement. The immunity provisions in the bill create an overwhelming incentive for advertisers and payment processors to comply with such a request immediately upon receipt. The Supreme Court has made clear that “only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression [and] only a procedure requiring a judicial determination suffices to impose a valid final restraint.” *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976).

- Section 103(a) is also constitutionally infirm because it contains a vague and sweeping definition of a website “dedicated to theft of U.S. property.” A site would qualify under the statutory definition if it “enables or facilitates” infringement by a third party, whether or not such

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activity meets the requirements for secondary liability under existing law. The deliberate departure from established concepts of copyright law deprives parties of adequate guidelines or criteria to interpret the Section 103 definition. Although statutory ambiguities may be tolerable in some situations, the First Amendment demands special precision in regulations of protected expression.

- To compound the problem, SOPA provides that a complaining party can file a notice alleging that it is harmed by the activities occurring on the site “*or portion thereof.*” Conceivably, an entire website containing tens of thousands of pages could be targeted if only a single page were accused of infringement. Such an approach would create severe practical problems for sites with substantial user-generated content, such as Facebook, Twitter, and YouTube, and for blogs that allow users to post videos, photos, and other materials.

- The bill’s harmful impact is aggravated by the fact that the definition of websites “dedicated to theft of U.S. property” includes sites that take actions to “avoid confirming a high probability of ... use” for infringement. Absence of knowledge of specific infringing acts would not be a defense. Thus, the definition would effectively require sites actively to police themselves to ensure that infringement does not occur. In effect, the bill would impose the very monitoring obligation that existing law (in the form of the Digital Millennium Copyright Act of 1998) expressly does *not* require. SOPA would undo the statutory framework that has created the foundation for many web-based businesses.

- Faced with such pervasive uncertainties, many sites will predictably be chilled from engaging in fully protected and lawful speech, for fear that they will be accused of a SOPA violation and suffer a cutoff of revenue from online advertising or credit card payments for transactions. The threat of such a cutoff would deter Internet companies from adopting

innovative approaches to hosting and linking to third party content and from exploring new kinds of communication. Such *ex ante* chilling effect could not be remedied by invalidating certain problematic applications of the statute *ex post*. The chill is inherent in the statute as drafted.

- SOPA Section 103 is far too sweeping on its face to comply with the constitutional requirement of “narrow tailoring.” Although SOPA’s supporters have described the bill as directed at “foreign rogue websites,” the definitions in the bill are not in fact limited to foreign sites or to sites engaged in egregious piracy. SOPA will lead to the silencing of a vast swath of fully protected speech and to the shut-down of sites that have not themselves violated any copyright or trademark laws.

- Another constitutionally infirm part of the bill is Section 102, which authorizes suits by the U.S. Attorney General against foreign websites or portions thereof that allegedly “facilitate” infringement. If the owner or operator cannot be located, the Attorney General may proceed on an “in rem” theory. In such cases, it appears highly unlikely that there would ever be an adversary hearing testing the merits of the government’s allegations. Even where the owner or operator of a foreign site is known, it seems doubtful that the government’s allegations would be tested, since foreign sites will often be unwilling to enter a U.S. court. In the meantime, the blacklist would deny the right of U.S. audiences to receive constitutionally protected information – at the very time our government criticizes other countries for denying their citizens access to websites that lack official approval.

- I am aware that some First Amendment experts have supported SOPA, including my friend Floyd Abrams, who submitted a letter dated November 7, 2011, to Chairman Lamar Smith (R-TX) on behalf of the Motion Picture Association and other clients. However, I part company with Mr. Abrams on this issue. I believe his letter provides an excellent explanation of why

existing law, including the Digital Millennium Copyright Act, is on the whole consistent with the First Amendment, but I do not believe his letter adequately analyzes or even meaningfully confronts the sweeping changes that SOPA would enact. Indeed, Mr. Abrams ultimately acknowledges that the remedies under SOPA may result in “*the blockage of non-infringing or protected content.*” (Letter of Nov. 7, 2011 from Floyd Abrams to Hon. Lamar Smith, at 12 (emphasis added).) He acknowledges that seizure powers under the copyright law must be exercised with “due regard to First Amendment considerations” (p. 4) and that “[t]he Internet is one of the greatest tools of freedom in the history of the world.” (p. 2) He also recognizes that “[i]t is a fundamental principle of First Amendment jurisprudence that government restrictions on speech should be narrowly tailored to avoid unnecessarily burdening protected speech.” (p. 10).

- These concessions go to the heart of the constitutional defect evident on the face of SOPA. Although the problems of online copyright and trademark infringement are genuine, SOPA is an extreme measure that is not narrowly tailored to governmental interests. It is a blunderbuss rather than a properly limited response, and its stiff penalties would significantly endanger legitimate websites and services. Its constitutional defects are not marginal ones that could readily be trimmed in the process of applying and enforcing it in particular cases. Rather, its very existence would dramatically chill protected speech by undermining the openness and free exchange of information at the heart of the Internet. It should not be enacted by Congress.

BACKGROUND

Today, the 1998 Digital Millennium Copyright Act (DMCA) forms the basis of the legal framework that has made the U.S. Internet industry the most successful in the world. Under the DMCA, an Internet company that serves as a conduit for third-party communications is granted a

statutory safe harbor from liability, so long as it creates a process to respond to a copyright owner's notice about infringing content on the Internet company's platform. 17 U.S.C. § 512(a), (c). The balance struck by the DMCA protects end users by making clear that Internet companies do not need to monitor their users' activities in order to qualify for the safe harbor. It protects copyright owners by providing them a quick and efficient means of removing infringing content. It protects website operators and others posting content by targeting relief at infringing conduct.

SOPA departs from the existing legal framework in several dramatic and constitutionally fatal respects:

(1) Section 103 of the bill establishes a private right of action authorizing plaintiffs to seek remedies against both domestic and foreign websites that are "dedicated to theft of U.S. property." The plaintiff may be anyone with an intellectual property right harmed by copyright or trademark infringement on the site; the plaintiff need not be the owner of the infringed copyright or trademark.

Under a notice-and-termination procedure, the plaintiff notifies an online advertiser or payment processor (such as a credit card processor) of an allegedly infringing site. The advertiser or payment processor must take action to cease providing service to that site within five days.

The bill also provides that the online advertiser or payment processor is required to alert the allegedly infringing site of the notice in "timely" fashion. The site is then permitted to send a counter-notice to the online advertiser or payment processor, but the bill does not require the advertiser or payment processor to restore service.

If the advertiser or payment processor chooses to restore service as requested in the counter-notice, then the plaintiff can sue the operator of a U.S. website under ordinary jurisdictional principles, or a foreign website under a new “in rem” theory of jurisdiction. If the court finds that the site is “dedicated to the theft of U.S. property” as defined by the statute, the court may issue injunctive relief. In addition, the court may issue an order that the plaintiff can then serve on online advertisers and payment processors, which must take technically feasible and reasonable measures to terminate service to the site within five days. An advertiser or processor that fails to comply with such an order is subject to monetary sanctions. Conversely, advertisers and payment processors that comply are afforded immunity from any future, collateral lawsuits that may be filed against them by terminated websites.

(2) Section 104 provides a broad grant of immunity to service providers, payment processors, online advertisers, search engines, domain registries, and domain name registrars for voluntarily terminating services, blocking financial transactions, or blocking access to Internet sites, so long the entity “reasonably” believes that the site in question is a “foreign infringing site” or a site “dedicated to theft of U.S. property,” and that the action taken is consistent with the terms of service or other contractual rights. Thus, SOPA encourages firms to shut down, block access to, and stop servicing U.S. and foreign websites based solely on an interested party’s unilateral *allegation* that they are illegal, in the absence of a judicial finding of infringement. There is no mechanism for restitution if a website’s property, business, or reputation has been wrongfully harmed – or, indeed, ruined – by an entity taking action pursuant to Section 104. In light of the immunity afforded by Section 104, service providers will have strong incentives to shut down websites or terminate relationships with sites merely *accused* of being “dedicated to theft of U.S. property.”

(3) Section 102 authorizes the Attorney General to sue a “foreign infringing site” either by name or (if the owner or operator cannot be located) under an “in rem” theory. The court is authorized to issue a cease-and-desist order, which can then be served on U.S. entities. U.S. service providers receiving such an order are required to “prevent access” by their U.S. subscribers to the foreign site, by preventing subscribers “from resolving to that domain name’s [IP] address.” Search engines must prevent the site from being served as a direct hypertext link. Payment processors must prevent payment transactions between the site and U.S. customers (or customers subject to U.S. jurisdiction). Online advertisers must prevent their networks from providing ads to the foreign website. Each of these entities is required to take “technically feasible and reasonable measures” to comply within five days of receiving the order.

ANALYSIS

Several provisions of SOPA violate the First Amendment, and these constitutional violations are inherent in the statute as drafted. The defects are not simply incidental or occasional imperfections created by unusual applications of the statute. Rather, the flaws arise from the fundamental structure of the bill.

(1) The notice-and-termination procedure of Section 103(a) poses grave dangers to protected speech. This provision of the bill would give copyright owners the power to stop online advertisers and credit card processors from doing business with a website, merely by filing a unilateral notice that the site is “dedicated to theft of U.S. property” – even if no court has actually found any infringement. The immunity provisions in the bill create an overwhelming incentive for advertisers and payment processors to comply with such a request immediately upon receipt.

(a) A procedure that delegates to a private party the power to suppress speech without prior notice and a judicial hearing violates the “prior restraint” doctrine. “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976).

The Supreme Court has made clear that “only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression [and] only a procedure requiring a judicial determination suffices to impose a valid final restraint.” *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). Thus, in *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989), the Court held that even a finding of probable cause by a state court was not sufficient to allow seizure of material “presumptively protected by the First Amendment,” because the state court’s ruling was merely preliminary. “While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing.” *Id.* at 63; *see also New York v. P.J. Video, Inc.*, 475 U.S. 868, 873 (1986) (“the large-scale seizure of books or films constituting a ‘prior restraint’ must be preceded by an adversary hearing”).

The prior restraint doctrine makes clear that a legislative scheme silencing speech before a court has ruled it to be legally unprotected is unconstitutional on its face. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), for example, the Supreme Court invalidated a procedure whereby the Rhode Island Commission to Encourage Morality in Youth sent informal notices to advise fifty-three book distributors that certain books and materials were deemed objectionable. The Supreme Court held that even such informal sanctions – sanctions that did not actually seize or ban any books – were impermissible prior restraints because they were undertaken without

prior adjudications by the courts. The Court opined that official notices amounting to “coercion, persuasion, and intimidation” could chill the exercise of First Amendment rights. *Id.* at 67 & n.8. The Court identified the constitutional flaw as the absence of “judicial determinations that such publications may lawfully be banned” (*id.* at 70):

Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission’s practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.

Id. at 70.

These principles apply *a fortiori* to the communication regulated by SOPA. Internet speech, of course, is fully protected expression, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and the prior restraint doctrine clearly governs restrictions on such speech. In *Center For Democracy & Technology v. Pappert*, 337 F.Supp.2d 606 (E.D.Pa.2004), for example, the court held that a statute compelling Internet service providers (ISPs) to block websites displaying child pornography was an administrative prior restraint of protected speech barred by First Amendment, because the ban resulted in blocking websites having nothing to do with unprotected speech. *Id.* at 656. The court was not deterred by the fact that the notices issued to ISPs purported to be informal and used the word “should” when requesting that the ISPs disable access to allegedly pornographic material; the court opined that a reasonable person would feel coerced because the notices made clear that defendants could force the ISPs to comply by court order.

Further, the constitutional prohibition on prior restraints applies every bit as fully to legislative measures as it does to exercises of administrative authority or executive discretion. It

is, after all, Congress to which the First Amendment is expressly addressed. And no less an authority than James Madison wrote:

[T]he great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also.

(Quoted in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931)).

SOPA manifestly violates this bedrock prior restraint doctrine. The notices authorized by Section 103(a) of SOPA are more coercive than the informal warnings held unlawful in *Bantam Books* and related cases, and SOPA does not contain the requisite judicial safeguards to satisfy the prior restraint doctrine. The unilateral notice may be issued by any private party that believes its intellectual property is harmed by copyright or trademark infringement on the site; the plaintiff need not even be the owner of the infringed copyright or trademark. An online advertiser or payment processor who receives a notice of an allegedly infringing site must take action to cease providing service to that site within five days. Although the advertiser or payment processor is required to alert the allegedly infringing site of the notice in “timely” fashion, the timeline is so compressed that the site will likely be cut off before it even has the opportunity to respond. Certainly, there is no guarantee that an adversary hearing or prompt judicial review will occur. Further, even if the allegedly infringing site sends a counter-notice to the online advertiser or payment processor, SOPA does not require the advertiser or payment processor to restore service. In light of the broad immunity provisions of the bill, many advertisers and payment processors will err on the side of keeping service off.

The unilateral nature of the Section 103 notice underscores the constitutional violation. The Supreme Court has opined that ex parte or one-sided submissions raise a grave risk of error

and attendant constitutional problems. For example, in *Connecticut v. Doehr*, 501 U.S. 1 (1991), this Court found the risk of error in a state attachment statute too great even where a judge reviewed a complaint and affidavit prior to the attachment, because there was no independent review of potentially “one-sided, self-serving and conclusory submissions.” *Id.* at 13. Moreover, in requiring an online advertiser or payment processor to act upon mere receipt of a unilateral notice, SOPA Section 103 effectively delegates governmental power to private individuals – creating an irreducible potential for abuse and highlighting another facet of the proposed measure’s constitutional infirmity. *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (“in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor”); *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) (invalidating city ordinance that authorized private property owners to fix building set-back lines governing their neighbors, because “it enables the convenience or purpose of one set of property owners to control the property right of others”).

(b) Another serious constitutional flaw is that Section 103(a) contains a vague and sweeping definition of a website “dedicated to theft of U.S. property.” A site would qualify under the definition if it “enables or facilitates” infringement by a third party, whether or not such activity meets the requirements for secondary liability under existing law. Today, secondary liability for copyright infringement may not be imposed by presuming or imputing intent to cause infringement solely from the design of a product capable of substantial lawful use, even when the product’s distributor knows that it is in fact used for infringement. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984); *see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 934 (2005) (“Sony’s rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product.”).

In place of this familiar and nuanced body of judge-made law, SOPA substitutes a new and uncertain statutory standard. The abstract concepts of “enabl[ing] or facilitat[ing]” infringement by third parties, without more, will leave parties guessing at the precise meaning of SOPA. The deliberate departure from established concepts of secondary liability means that there are no guidelines or criteria to interpret the Section 103 definition. Although statutory ambiguities may be tolerable in many areas of the law, the First Amendment demands special precision and predictability in dealing with protected expression. *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729, 2735 (2011) (noting the “heightened vagueness standard applicable to restrictions upon speech entitled to First Amendment protection”).

The statutory standard of Section 103 is at least as imprecise as prohibitions on speech the Supreme Court has declared void for vagueness in the past. For example, in *Plummer v. City of Columbus*, 414 U.S. 2 (1973) (*per curiam*), the Court held that a statute providing that “[n]o person shall abuse another by using menacing, insulting, slanderous, or profane language” was facially invalid. *Id.* at 2. In *Coates v. Cincinnati*, 402 U.S. 611 (1971), the Court struck down a municipal ordinance prohibiting three or more persons to “conduct themselves in a manner annoying to persons passing by.” *Id.* at 614. In *Houston v. Hill*, 482 U.S. 451 (1987), the Court invalidated an ordinance making it “unlawful for any person to . . . in any manner oppose . . . or interrupt any policeman in the execution of his duty.” *Id.* at 455. In *Carlson v. California*, 310 U.S. 106 (1940), a unanimous Court invalidated an ordinance prohibiting individuals from carrying or displaying any sign or banner or from picketing near a place of business “for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from entering any such works, or factory, or place of business, or employment.” *Id.* at 109.

To compound the burdens and uncertainty, SOPA provides that a complaining party can serve as a “Qualifying Plaintiff” entitled to file an accusation of infringement so long as it can allege harm from activities occurring on the site “*or portion thereof*.” Conceivably, an entire website containing tens of thousands of pages could be targeted if only a single page were alleged to cause harm. Such an approach would create severe practical problems for sites with substantial user-generated content, such as Facebook, Twitter, and YouTube, and for blogs that allow users to post videos, photos, and other materials. A blogging site with millions of pages of blogs from hundreds of thousands of users could be targeted if one page or one blog on the site contained or promoted infringing content. A social networking site could be targeted if one user’s page included infringing content. A cloud computing service with millions of users could be similarly at risk.

SOPA’s harmful impact is aggravated by the fact that the definition of websites “dedicated to theft of U.S. property” includes sites that take actions to “avoid confirming a high probability of ... use” for infringement. Absence of knowledge of specific infringing acts would not be a defense. Thus, the definition would effectively require sites actively to police themselves to ensure that infringement does not occur. For sites with significant third party content, the resulting burden would be overwhelming.

In effect, the bill would impose the very monitoring obligation that existing law (in the form of the DMCA) was expressly designed to avoid. Until now, Congress has promised online services a safe harbor against copyright liability so long as they take down allegedly infringing material when notified of a violation. This bill would undo the statutory framework that has created the foundation for many web-based businesses.

Faced with such uncertainties, many sites will be chilled from engaging in fully protected and lawful speech, for fear that they will be accused of a SOPA violation and suffer a cutoff of revenue from online advertising or credit card payments for transactions. The threat of such a cutoff would deter Internet companies from adopting innovative approaches to hosting and linking to third party content and from exploring new kinds of communication. “Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech -- harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

(c) SOPA Section 103 violates the First Amendment for yet another reason: it is far too sweeping to comply with the constitutional requirement of “narrow tailoring.” Although SOPA’s supporters have described the bill as directed at “foreign rogue websites,” the definitions in the bill are not limited to foreign sites or to egregious pirate sites. Rather, SOPA will lead to the silencing of a great deal of entirely permissible speech and to the shut-down of sites that have not themselves violated any copyright or trademark laws.

The Court has made clear that “[b]road prophylactic rules in the area of free expression are suspect Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *NAACP v. Button*, 371 U.S. 415, 438 (1963). “A regulation is not ‘narrowly tailored’ [for purposes of the First Amendment] . . . where . . . a substantial portion of the burden on speech does not serve to advance [the government’s] goals.” *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 122, n.* (1991) (internal quotation marks omitted). If the government wishes to reduce trash on city streets, it may ban

littering, but it may not ban all leafleting.¹ If the government seeks to eliminate fraudulent fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising.² If the government wishes to protect householders from unwanted solicitors, it may enforce “No Soliciting” signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say.³

By the same token, if the government wishes to pursue the goal of eliminating copyright and trademark infringement, it may punish those violations directly, but it may not adopt a blunderbuss solution that chills or prohibits a great deal of fully protected and legitimate expression. Thus, in *United States v. Grace*, 461 U.S. 171 (1983), the Court refused to uphold a ban on expressive activity on the sidewalks surrounding the Supreme Court. The purpose of the restriction was the perfectly valid interest in security, just as the purpose of SOPA is the perfectly valid interest in protecting intellectual property rights. In *Grace*, the restriction furthered the government’s interest, but it furthered it with insufficient precision and hence at excessive cost to the freedom of speech. There was, the Court said, “an insufficient nexus” between security and all the expressive activity that was banned. *Id.* at 181.

¹ *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939).

² *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 800 (1988) (“In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available. For example, as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.”); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (“The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.”); see also *Edenfield v. Fane*, 507 U.S. 761, 776-777 (1993).

³ *Martin v. City of Struthers*, 319 U.S. 141 (1943).

SOPA suffers from the same intrinsic defect. Whatever the precise level of First Amendment scrutiny applied,⁴ the bill sweeps far too broadly and vaguely to comply with the free speech guarantee. The First Amendment requires that the government proceed with a scalpel – by prosecuting those who break the law – rather than with the sledgehammer approach of SOPA, which would silence speech across the board.

The alternative procedure of the DMCA, which protects copyrights without unnecessarily trammeling on the rights of free speech, confirms that SOPA cannot satisfy the constitutional narrow tailoring requirement. The Supreme Court “ha[s]made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.” *Thompson*, 535 U.S. at 371. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), for example, the Court found a law prohibiting beer labels from displaying alcohol content to be unconstitutional in part because of the availability of alternatives “such as directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high

⁴ SOPA Section 103 targets speech based on its content, and the bill is justified by reference to “the content of the regulated speech,” *United States v. Eichman*, 496 U.S. 310, 318 (1990) (citation and internal quotation marks omitted), i.e., whether the message or substance of the speech infringes copyright or trademark rights. Therefore, SOPA is properly subject to the strictest version of First Amendment scrutiny – the kind applied by the Supreme Court last Term to invalidate a California law aimed at restricting minors’ access to violent video games. *Brown v. Entertainment Merchants Ass’n*, 131 S.Ct. 2729, 2738 (2011) (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny – that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an ‘actual problem’ in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. ‘It is rare that a regulation restricting speech because of its content will ever be permissible.’”) (citation omitted). However, the analysis in text of the “narrow tailoring” defects in Section 103 applies under any version of First Amendment review. The Supreme Court has frequently used so-called “intermediate” First Amendment scrutiny to invalidate restrictions on speech as insufficiently tailored. See *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011) (overturning Vermont law that restricted the sale, disclosure, and use of pharmacy records revealing the prescribing practices of individual doctors); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (striking down law banning advertising and promotion of certain compounded drugs); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (striking down restrictions on alcohol labeling); *Ibanez v. Fla. Dept. of Pro. & Bus. Regulation*, 512 U.S. 136, 146 (1994) (overturning reprimand of attorney who used CPA and CFP designations in advertising); *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (overturning ban on in-person solicitation by CPAs); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 10 (1993) (invalidating regulation of newsracks for commercial handbills).

alcohol strength . . . , or limiting the labeling ban only to malt liquors.” *Id.* at 490-91. The fact that “all of [these alternatives] could advance the Government’s asserted interest in a manner less intrusive to . . . First Amendment rights” indicated that the law was “more extensive than necessary.” *Id.* at 491. *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (striking down a prohibition on advertising the price of alcoholic beverages in part because “alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance”).

(d) It is no defense to say that, rather than banning speech outright, Section 103 of SOPA “merely” deprives websites of speech-related funding by requiring online advertisers and payment processors to sever their relationships with those sites. Courts have always treated such cutoffs of revenue from expression as fully equivalent to direct suppressions of speech. In *NTEU v. United States*, 513 U.S. 454, 469 (1995), for example, the Supreme Court struck down a limit on honoraria because it decreased the “incentive” of government employees to speak. In *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991), the Court invalidated New York’s “Son of Sam” law, which prevented criminals from profiting from publishing deals by impounding the receipts. In *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781, 789 n.5 (1988), the Court held that financial regulation of professional fundraisers could not be defended as a “merely economic” regulation having “only an indirect effect on protected speech,” but rather triggered full First Amendment scrutiny. Hence, prohibiting or restricting payment for communication has long been treated as an infringement of speech. *See also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (striking down on First Amendment grounds a statute regulating contracts between charities and professional fundraisers and forbidding such contracts if, after allowing a deduction for many of

the costs associated with the solicitation, the fundraiser retained more than 25% of the money collected); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (invalidating local ordinance requiring charitable solicitors to use 75% of funds solicited for charitable purposes); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) (tax on ink held to violate First Amendment). In *Meyer v. Grant*, 486 U.S. 414, 424 (1988), the Court struck down a ban on the payment of petition circulators, not a rule restricting what they could say, and in *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2817-19 (2011), the Court treated laws with purely financial impacts (rules awarding political opponents greater financial resources in the event a candidate exceeded certain contribution or expenditure limits) as infringements on speech.

(2) Another constitutionally infirm section of the bill is Section 102, which authorizes suits by the U.S. Attorney General against foreign websites or portions thereof that allegedly “facilitate” infringement. The bill makes clear that infringement may be found where only a “portion” of the site is in violation. Under the bill, it appears that the Attorney General could sue if only a single page on a 1,000-page website were deemed to infringe.

Such lawsuits would require service providers (which under the bill include telephone and cable companies, university networks, libraries, private businesses, and others)⁵ to take “technically feasible and reasonable measures designed to prevent access” to infringing sites, including but not limited to measures designed to prevent the domain name of the site from resolving to the domain name’s Internet Protocol address. An Internet “search engine” (which,

⁵ SOPA’s definition of “service provider” includes providers of Internet access and transport for Internet communications or any “provider of online services” that operates a “nonauthoritative domain name system servicer.” H.R. 3261 Section 101(22) (cross-referencing 17 U.S.C. § 512(k)(1)).

under the bill, arguably includes any site with a “search box” that allows users to search for content elsewhere on the site or domain)⁶ is required to take “technically feasible and reasonable measures” to prevent an infringing site from being served as a direct hypertext link. Payment processors and online advertisers are similarly required to sever ties with the site.

Experts have warned of the dangers of disrupting the IP address system at the heart of the Internet and about the risks of exposing U.S. companies to technology mandates by federal judges, who are authorized under the bill to second-guess the measures used to block access or service to Internet sites at the request of law enforcement or private parties. Their concern may have been with the problems of such disruption from a policy perspective. My concern in this memorandum, however, is strictly constitutional in nature: the bill will prevent U.S. audiences from receiving a great deal of entirely lawful and legitimate information, in light of the procedure by which law enforcement authorities can sue “foreign infringing sites.” Section 102 authorizes the Attorney General to sue a “foreign infringing site” under an “in rem” theory if the owner or operator cannot be located, and in such cases it appears highly unlikely that there would ever be an adversary hearing testing the merits of the government’s allegations. Even where the owner or operator of a foreign site is known, it seems doubtful that the government’s allegations would be tested, since foreign sites will often be unwilling to enter a U.S. court. In the meantime, the blacklist would deny the right of U.S. audiences to receive the information – at the very time our government criticizes other countries for denying their citizens access to websites that lack official approval.

⁶ SOPA provides that “[t]he term ‘Internet search engine’ means a service made available via the Internet that searches . . . information or Web sites available elsewhere on the Internet.” H.R. 3261 Section 101(16).

The scheme therefore conflicts with the Supreme Court’s recognition that U.S. audiences have First Amendment rights to receive information from foreign sources, even where the overseas speakers themselves fall outside the First Amendment’s protective umbrella. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965) – the first case in which the Supreme Court invalidated an Act of Congress on free speech grounds – the Court held unconstitutional a mandate that U.S. recipients of “communist political propaganda” from overseas affirmatively notify the Post Office that they wish to receive it. The law required the Post Office to keep an official list of persons desiring to receive communist political propaganda, *id.* at 303, which, of course, was intended to chill demand for such materials. The Court was not deterred by the fact that the foreign originators of the communications lay outside the U.S. and beyond the reach of the First Amendment’s protections for speakers and instead opined that U.S. audiences had a First Amendment right to *receive* those communications. *Id.* at 307; *see also id.* at 307-08 (Brennan, J., concurring) (“These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees would then have to establish their standing to vindicate the senders’ constitutional rights, as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of a foreign government. However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment ‘necessarily protects the right to receive it.’”) (citations omitted).

Subsequent cases have re-affirmed the audience’s independent First Amendment right to receive protected information. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (citing *Lamont*); *Virginia State Bd. of Pharm. v. Virginia*

Citizens Consumer Council, Inc., 425 U.S. 748, 769-70 (1976) (relying on right of audience to justify First Amendment protection for commercial speech).

SOPA Section 102 violates this right by creating an overbroad scheme that will predictably result in depriving U.S. audiences of protected, non-infringing speech.

(3) I recognize that some commentators and scholars have defended the constitutionality of SOPA. In particular, Floyd Abrams, a well known First Amendment advocate, submitted a letter dated November 7, 2011 to Chairman Smith on behalf of the Motion Picture Association and other clients. However, Mr. Abrams' letter does not come to grips with the far-reaching changes in copyright and trademark law that SOPA would trigger.

In fact, much of Mr. Abrams' argument actually serves, in my view, to underscore the constitutional problems with SOPA. For example, Mr. Abrams acknowledges that seizure powers under the copyright law must be exercised with "due regard to First Amendment considerations" (p. 4) and that "[t]he Internet is one of the greatest tools of freedom in the history of the world." (p. 2). Yet SOPA would suppress a great deal of protected Internet speech, reduce investment and innovation, and eliminate the statutory framework (in the form of the DMCA) that has served as the foundation for the business model for many websites.

In addition, his letter concedes several of the points in my analysis:

- Mr. Abrams recognizes that "[i]t is a fundamental principle of First Amendment jurisprudence that government restrictions on speech should be narrowly tailored to avoid unnecessarily burdening protected speech." (p. 10). I believe SOPA fails this essential requirement.

- Mr. Abrams admits that "some operators of allegedly infringing websites may knowingly decline to participate in U.S. court proceedings. Such a choice, after legitimate notice

and procedural safeguards are provided, may lead to *ex parte* proceedings and default judgments.” (p. 9). This admission demonstrates that, in practical effect, allegations of infringement against foreign sites may never be tested in court, resulting in the silencing of speech without any adversarial hearings.

- Mr. Abrams recognizes that, even when court hearings are provided, SOPA may result in the suppression of entirely lawful, protected speech:

Regardless of the particular standard or definition of foreign infringing sites, *court-approved remedies under the Stop Online Piracy Act may result in the blockage or disruption of some protected speech.* As discussed above, the bill provides a range of injunctive relief is available, with a court making the final determination as to whether and how to craft relief against a website operator or owner or third party intermediaries. When injunctive relief includes blocking domain names, *the blockage of non-infringing or protected content may result.*

(pp. 11-12) (emphasis added).

Mr. Abrams stresses “[t]he Supreme Court’s most detailed treatment of the interrelationship between the First Amendment and copyright, the seminal case of *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).” (p. 3). Yet the *Harper & Row* case involved a traditional, time-honored copyright principle – the “fair use” doctrine – not a radical departure from the familiar contours of copyright law like the provisions of SOPA. *Harper & Row* did not hold that any kind of revolutionary, speech-suppressing statute would be constitutional, so long it was wrapped in the mantle of copyright law. In fact, in a subsequent case, the Supreme Court made clear that copyright statutes are not “categorically immune” from First Amendment scrutiny and explained that the approach of *Harper & Row* applied only “when . . . Congress has not altered the traditional contours of copyright protection.” *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003). Whatever else may be said of SOPA, it certainly “alters” those contours.

The fact that SOPA's purpose is the protection of intellectual property rights does not change the constitutional calculus. Benign motives do not shield legislation from First Amendment scrutiny, nor is "[i]llicit legislative intent . . . the sine qua non of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). The Supreme Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Id.* at 592; *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (striking down law despite absence of evidence that "the legislature intends to suppress certain ideas"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (speaker need adduce "no evidence of an improper censorial motive" in order to invalidate law).

CONCLUSION

To their credit, SOPA's sponsors recognize the importance of the constitutional issues raised by the statute they propose. The bill includes language stating "[n]othing in this Act shall be construed to impose a prior restraint on free speech or the press protected under the 1st Amendment to the Constitution." But proclaiming the bill to be constitutional does not make it so – any more than reminding everyone of a proposed law's good intentions renders that law immune to First Amendment scrutiny. At the same time, the proviso may have the unintended effect of rendering large swaths of the bill inoperative. For it is difficult to understand how the provisions discussed above would operate *except* as impermissible prior restraints. The proviso creates confusion and underscores the need to go back to the drawing board and craft a new measure that works as a scalpel rather than a sledgehammer to address the governmental interests that SOPA purports to advance.